Supreme Court, U.S.
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No.

In The
Supreme Court of the United States
October Term, 1986

MORTON A. KIER,

Petitioner,

vs.

COMMERCIAL UNION INSURANCE COMPANIES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Questions Presented

1. Whether the Seventh Circuit obliterated an age discrimination plaintiff's Seventh Amendment rights and engaged in ever-increasing judicial activism found in Title VII cases by ignoring all the material evidence heard by a jury that found for plaintiff as to the issue of directly and circumstantially proving an articulated reason for firing was not worthy of credence.

2. Whether the Seventh Circuit can ignore abundant circumstantial evidence considered by a jury in a Title VII case and render an opinion the effect of which requires an age discrimination plaintiff to prove a nearly perfect case by direct evidence.

3. Whether the Seventh Circuit's approval of the exclusion of statistical evidence clearly showing a disparate impact as to age contrary to opinions of this Court and other circuits can stand.

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IN THE

SUPREME COURT OF THE UNITED STATES

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vs.

COMMERCIAL UNION INSURANCE COMPANIES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
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Prayer

Petitioner Morton A. Kier respectfully prays that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

Opinion Below

The opinion and judgment of the United

States Court of Appeals for the Seventh Circuit appears in Appendix A, attached hereto, and is reported at 808 F.2d 1254. The court's order denying Petition for Rehearing appears in Appendix B, attached hereto. The Memorandum and Order of the district court is attached hereto in Appendix D.

Jurisdiction

The opinion of the Court of Appeals for the Seventh Circuit affirming the judgment entered for defendant notwithstanding a jury verdict for plaintiff was entered January 6, 1987. A timely filed Petition for Rehearing was denied on February 2, 1987. This petition is filed within 90 days of said denial and jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

Constitution Provision Involved

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where

> the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Statute Involved

Age Discrimination In Employment Act of 1967, as amended, 29 U.S.C. §621 et seq. (ADEA). Pertinent provisions are set forth in Appendix C.

Statement of the Case

The basis for federal jurisdiction in the United States District Court was section 633a(c), 29 U.S.C., which authorizes the bringing of a civil action in any federal district court for such relief as will effectuate the purposes of the ADEA.

Plaintiff, Morton A. Kier, commenced an action in the district court charging defendant, Commercial Union Insurance Company, with

violation of the Age Discrimination In Employment Act (ADEA). The case proceeded to trial by jury and resulted in a verdict for plaintiff for $77,227.00 on January 28, 1985. On January 30, 1986, the district court granted defendant's motion for judgment notwithstanding the verdict. This was affirmed by the Court of Appeals for the Seventh Circuit on January 9, 1987.

The plaintiff, 53 at the time of his discharge, an experienced trial lawyer, was employed in defendant's Chicago office as one of four staff attorneys responsible for handling defendant's litigation files from their inception through trial. There was a managing attorney, age 61, for this office. Eventually defendant opened five additional staff counsel offices in various areas throughout the United States and this was directed by defendant's Vice-President William Bailey with the assistance of Kenneth Griffin. In 1980, Griffin was made managing attorney of all the claims

counsels' offices.

In April, 1981, all managing attorneys were called to a meeting in Boston where materials were passed out pertaining to the preparation of a training manual. The managing attorney in plaintiff's office attended this meeting. Griffin made specific assignments to the managing attorneys present.

The next month, May, 1981, plaintiff's managing attorney was appointed a judge and he recommended that plaintiff be appointed as acting managing attorney. At this time, plaintiff was 53 years old and the other members of the staff were 53, 43 and 38.

The evidence at trial showed that defendant had retained a California recruiter to conduct a search for a managing attorney and that defendant was looking for someone "between 40, 45, 50 at the most" and declined to interview an attorney who was past 50 but did interview an attorney under 50. Plaintiff had also applied for the permanent position of managing attorney

and was interviewed by Griffin.

On July 5, 1981, plaintiff received a memorandum concerning preparation of the training manuals, the materials for which were handed out back in April, 1981. The evidence is uncontradicted that plaintiff knew nothing about this subject and began a search for what it was he was to do.

After repeated attempts to find the materials and requests for them, plaintiff finally received them sometime in mid-September, 1981. While still apparently under consideration for the permanent managing attorney's position, plaintiff, in early October, 1981, heard an "unfortunate and false rumor" that the position had been filled and he thereupon returned the manual materials because it was his understanding that it was a project on which the newly hired managing attorney

should be working[1].

Thereupon, Griffin immediately called plaintiff and fired him for insubordination. At trial, Griffin testified that his position about the matter was that plaintiff had been "set up for a fall." Griffin erroneously thought Plaintiff had the work project materials back in April 1981.

Nonetheless plaintiff continued in his position as acting managing attorney and was not actually discharged until almost four months later after Griffin had hired a 32-year-old managing attorney for this office. Indeed, during this time Griffin asked Plaintiff a second time to write reasons to fire a 43-year-old attorney.

Plaintiff also presented statistical

---

[1] The rumor came into the picture three months after the memo. The Seventh Circuit opinion completely mistates the evidence in this regard when it states that plaintiff received the memo "just prior" to hearing the rumor. (App. 4a.) 808 F.2d at 1256. This falsely portrayed plaintiff as reacting rashly to a rumor and shirking his responsibilities.

evidence indicating a discriminatory disparate impact as to the age make-up of attorneys in defendant's offices in early 1981 as compared with 1983. This showed that in the Chicago office the average age went from 50 years down to 30 years. Plaintiff's statistical evidence also showed that the average age of attorneys in defendant's other offices similarly dropped appreciably for the same period of time.

The Court of Appeals for the Seventh Circuit found that a prima facie case of age discrimination was proven (as did the district court); that defendant proffered a valid reason to rebut plaintiff's prima facie case but that:

> For the jury verdict to stand, Kier would have to have shown that discharging an attorney for failure to work on a bona fide work project was not worthy of credence. 808 F.2d at 1259.

The court held the evidence insufficient to support the jury verdict.

As to this issue, plaintiff presented a litany of evidence which was totally ignored by

the Court of Appeals. Evidence heard by the jury which determined defendant's reasons not worthy of credence but disregarded by the Court of Appeals included:

> (1) plaintiff did not have the materials for the work project until September, 1981 despite the fact they were handed out in April, 1981;
>
> (2) plaintiff first learned of the existence of the work project in early July, 1981 upon receipt of the memo;
>
> (3) despite numerous requests, plaintiff was not sent the materials until September, 1981 when the other managing attorneys had already completed their assignments;
>
> (4) Griffin, who fired plaintiff for refusing to work on the project, testified he erroneously assumed that plaintiff had the materials back in April, 1981;
>
> (5) Griffin summed up defendant's position as being that plaintiff was "set up for a fall.";
>
> (6) Griffin admitted plaintiff's conduct in no way impeded the work project and that it was in fact never completed and was loosely dismissed as "a task of among many";
>
> (7) plaintiff's employment record was admittedly a spotless one;

(8) when Griffin began to concentrate of the make-up of the Chicago office he stated that the 61-year-old managing attorney who had resigned to become a judge would have been fired, the 53-year-old attorney was reduced to a claims adjuster and Griffin twice asked plaintiff to supply reasons to fire the 43-year-old attorney;

(9) when Griffin interviewed plaintiff for the managing attorney job in May or June, 1981, he did not tell plaintiff of any expectations concerning the work project.

Ignoring all of this evidence and instead accepting evidence in the light most favorable to the defendant, the court found there was no support for the verdict and that plaintiff did not meet his burden of showing that defendant's articulated reason for firing plaintiff-- insubordination-- was not worthy of credence.

As to the statistical evidence, the Seventh Circuit first states that it was inadmissible as not relevant to plaintiff's charge of age discrimination. Later in its opinion, the court admitted there may be "limited probative value *** to support Kier's theory that Commercial was

involved in an overarching plot to fire all its older attorneys and hire young attorneys." But, ignoring the evidence, the Seventh Circuit found there was "absolutely no evidence that any other attorneys were fired or forced to leave because of his or her age". (App.14a) 808 F.2d at 1258.

Reasons for Granting the Writ

There is a dire need for this court to establish a standard by which age discrimination cases may be circumstantially proven insofar as showing an articulated reason for discharge is not worthy of credence. The Seventh Circuit would require proof of a nearly perfect case with direct evidence -- an impossible task for an age discrimination plaintiff. Also the exclusion of statistical evidence showing a disparate impact in the age of defendant's staff attorneys mandates review of this case by this Court.

1. This petition presents an important question concerning a civil rights plaintiff's Seventh Amendment rights to have his jury verdict considered in the light of the recognized special considerations enunciated by this Court when reviewing age discrimination cases. The Seventh Circuit itself has recognized the unique circumstances that a plaintiff is placed in when attempting to prove

a case of age discrimination. The court has referred to such cases "in particular" as involving " 'sensitive and difficult' issues of fact. *** Plaintiffs often have great difficulty in gathering information and can present only circumstantial evidence of discriminatory motives. *** The credibility of witnesses is often crucial" and the jury's burden of deciding these issues often transcends a "fine line." Christie v. Foremost Insurance Co., 785 F.2d 584 at 586 (7th Cir. 1986); Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 154 (7th Cir. 1981); La Montagne v. American Convenience Products, Inc., 750 F.2d. 1405, 1409 (7th Cir. 1984).

This court has often noted that adherence to a standard of proof is more than a semantic exercise. Addington v. Texas, 441 U.S. 418, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979). The

applicable means of proof in Title VII cases[2] enunciated by McDonnell Douglas Corporation v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973), are "designed to assure that the plaintiff [has] his day in court despite the unavailability of direct evidence." Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121, 83 L.Ed.2d 523, 105 S.Ct. 613 (1985).

In this case, the Seventh Circuit opinion amounts to judicial activism in a civil rights case that ought not to be condoned. It omits facts heard by the jury and considered only limited testimony most favorable to the defendant movant in approving the grant of a motion for judgment notwithstanding the plaintiff's jury verdict.

It is obvious that a jury could conclude that defendant did not consider plaintiff's action as to the work project important until a

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[2] The ADEA and Title VII are parallel statutes. Lorillard v. Pons, 434 U.S. 575, 584 (1978)

reason to fire him appeared which would not cause defendant to run afoul of the ADEA.

The Seventh Circuit obliterated plaintiff's right to a jury trial by re-examining the facts tried by a jury and conducting that re-examination in a manner which paid lip service to well established criteria for review of evidence in age discrimination cases.

2. As to the exclusion of the statistical evidence, every court which has considered the question has allowed it.[3] Indeed, in McDonnell Douglas Corporation, 411 U.S. at 805, this Court noted that one example of evidence that could show pretext is "petitioner's general policy and practice with respect to minority employment" and held:

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[3] Cockrell v. Boise Cascade Corp., 781 F.2d 173, 176 (10th Cir. 1986); Laungesen v. Anaconda Company, 510 F.2d 307, 316 (6th Cir. 1975); Cova v. Coca Cola Bottling Company, 574 F.2d 958, 961 (8th Cir. 1978); Geller v. Markham, 635 F.2d 1027, 1032 (2nd Cir. 1980), cert. den., 451 U.S. 945 (1981); Shulz v. Hickok Mfg. Co., 358 F.Supp. 1208, 1213 (N.D. Ga. 1973) and see Connecticut v. Teal, 457 U.S. 440 (1982).

> On the latter point, statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks. [Citations omitted.] In short, on the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision.

Contrary to these established precepts, the Seventh Circuit blazes a new path for denial of a Title VII plaintiff's means of proof. It says that such statistics were relevant to hiring practices but not to firing practices. Merely stating the proposition demonstrates reason enough for review by this Court.

Moreover, the court ignored the evidence of Griffin's attitude toward three other staff attorneys in the age class protected by the ADEA. He vowed he would have fired a 61-year-old, actually demoted a 53-year-old to a claims adjuster and twice asked for reasons to fire a 43-year-old.

Conclusion

The need for review of this case is blatant. When all the facts heard by the jury that decided for plaintiff are considered in light of the nature of this case, the opinion represents an obliteration of plaintiff's Seventh Amendment rights and judicial activism in a Title VII case in its extreme form. This is especially true when exclusion of pertinent statistical evidence is a part of the court's holding.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 86-1319

MORTON A. KIER,
Plaintiff-Appellant,

v.

COMMERCIAL UNION INSURANCE COMPANIES,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 C 6110 - James B. Moran, Judge

Argued September 19, 1986 - Decided January 6, 1987

Before BAUER, Chief Judge, WOOD JR., Circuit Judge, and CAMPBELL, Senior District Judge.*

BAUER, Chief Judge. The jury returned a verdict for plaintiff in his age discrimination suit, and awarded $77,227.00 against his

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* The Honorable William J. Campbell, Senior District Judge for the Northern District of Illinois, is sitting by designation.

employer. Plaintiff claimed that his employer violated the Age Discrimination and Employment Act, 29 U.S.C. §621 et seq. ("ADEA"). The district court found the jury verdict unsupportable and entered judgment for the defendant notwithstanding the verdict. Plaintiff, Morton Kier, appeals. We find that a reasonable jury could not conclude that the defendant had violated ADEA and we therefore affirm the order of the district court.

I.

The decision of a district court judge to enter a judgment notwithstanding the verdict must be reviewed de novo. Kunzelman v. Thompson, 799 F.2d 1172, 1179 (7th Cir. 1986). We must view all evidence and any reasonable inferences that may be drawn therefrom, in a light most favorable to the party winning the verdict. LaMontagne v. American Convenience Products, Inc., 750 F.2d 1405, 1410 (7th Cir. 1984); Syvock v. Milwaukee Boiler Mfg. Co.,

Inc., 665 F.2d 149, 153 (7th Cir. 1981). Accordingly, the facts which follow are presented in light most favorable to Kier. Ultimately, we must determine whether there was substantial evidence to support the jury verdict. LaMontagne, 750 F.2d at 1410.

Morton Kier was hired by the Chicago Office of Commercial Union Insurance Companies ("Commercial") as a staff attorney in 1973; at that time, Kier was 45 years old. The office employed four staff attorneys and one managing attorney. In May, 1981, the managing attorney for the Chicago office left and Commercial began its search for a replacement. On the suggestion of the department managing attorney, Kier was asked to run the office until a replacement could be found. J. Kenneth Griffin, an assistant vice president, handled the search for a new managing attorney and invited all current staff attorneys, including Kier, to apply. Kier and two other staff attorneys in the Chicago

office applied for the position of permanent managing attorney. Only Kier was called in for a second interview.

At trial, Kier presented the testimony of John Milano, an executive of another insurance company, who said he was contacted by an unidentified employment recruiter. The recruiter was searching on behalf of a major Chicago insurance company for a managing attorney who was "40, 45, 50 at most." (Tr. 205). The recruiter never divulged the name of the company, but various circumstantial evidence supported a finding that the recruiter called on behalf of Commercial.

While still apparently under consideration, Kier heard the unfortunate and false rumor that the managing attorney position had been filled. Just prior to hearing the rumor, Kier had received a memo from Joseph Ravich, sent to all managing attorneys, regarding the preparation of a training manual for new attorneys. Acting on

the rumor and feeling slighted, Kier testified that he chose the training manual project as a "convenient vehicle" (Tr. 63,98,99) to express his disappointment in being passed over for the managing attorney position. He told Ravich that he would not work on the manual and sent a copy of the letter to J. Kenneth Griffin, who was in charge of hiring a new managing attorney. Approximately one week after sending the letter, Griffin called Kier and told him he was fired. According to Kier, Griffin said, "You believe in rumors, and I can't have a man working for me who believes in rumors or who takes action on the strength of rumors. You are insubordinate, and you are fired." (Tr. 64-65). Kier, in fact, was not fired until two or three months later, after Griffin had secured the agreement of his superiors to fire Kier. Kier testified that he knew that termination might result from his refusal to cooperate in the preparation of the training manual (Tr. 127,142). In the meantime,

Kier had apologized and asked to be retained as a staff attorney. Sometime in November, Griffin told Kier that he would not be fired and that if the new managing attorney requested it, Kier could stay on.

II.

Although ADEA prohibits employers from discriminating against employees based on age, in this case Commercial was more than Kier's employer. Kier was Commercial's attorney and Commercial was Kier's client; nothing in this opinion should be read to limit the clear right of a client to discharge his or her attorney for any reason, or for no reason. This principle reflects an understanding that the relationship between attorney and client is based on trust and cannot function unless the client has complete confidence in his or her attorney. However, although defendant submitted a jury instruction on this issue, it did not press any objection to the district court's failure to

instruct on the issue. Nor did Commercial submit any memoranda of law in support of its assertion, presented for the first time below as a jury instruction, that an in-house attorney should be treated the same as a non-employee attorney for the purpose of discharge, More importantly, the defendant did not present this issue on appeal. Accordingly, we deem the argument waived. See, United States v. Markowski, 772 F.2d 358, 362-363 (7th Cir, 1985); Goldblatt Bros., Inc. v. Home Indem. Co., 773 F.2d 121, 126 (7th Cir. 1985).

A plaintiff may show age discrimination either through direct or circumstantial evidence of discharge based on age. See Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985); Dale v. Chicago Tribune Co., 797 F.2d 458 (7th Cir. 1986). The analytic framework appropriate for cases arising under ADEA is set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dep't. of Community Affairs v.

Burdine, 450 U.S. 248 (1981). See Tice v. Lampert Yards, Inc., 761 F.2d 1210, 1212 (7th Cir. 1985). Under McDonnell and Burdine, a plaintiff must first establish a prima facie case of discrimination. To establish a prima facie case under ADEA, an employee must show (1) that he belongs to the protected class, (2) that his job performance was sufficient to meet his employer's legitimate expectations, (3) that he was discharged in spite of his performance, and (4) that the employer sought a replacement for him. Dale, 797 F.2d at 462. The burden of production then shifts to the employer to articulate a legitimate, non-discriminatory reason for discharge. Once such a reason is advanced, the employee, the employee must prove by a preponderance of the evidence that the reason is a mere pretext for discrimination. Burdine, 450 U.S. at 252-53. Although McDonnell provides for shifting burdens of production, it is important to note that the ultimate burden of

persuasion remains with the plaintiff at all times. Dale, 797 F.2d at 462.

There is a general dispute here as to whether Kier ever made a sufficient showing to support a prima facie case of age discrimination. Commercial argues that he did not and that the burden of production to articulate a legitimate reason for firing never shifted to the defendant. The source of these opposing contentions is whether Kier's failure to work on the training manual is properly an element of the prima facie case or merely the articulated reason for discharge. The district court denied a motion for summary judgment based on Kier's failure to present a prima facie case of discrimination. We need not resolve this issue. After a trial on the merits, "disputes about the prima facie case fall away." Morgan v. South Bend Community School Corp., 797 F.2d 471, 480 (7th Cir. 1986); See also United States Postal Service Bd. of Governors v. Aikens, 460

U.S. 711 (1983). We need resolve only the ultimate question of whether there was sufficient evidence for a jury to conclude that age was a determinative factor in Kier's discharge.

III.

Before addressing the sufficiency of the evidence presented to the jury, we will review Kier's two remaining contentions of error. First, Kier contends it was error for the district court to refuse to allow him to amend his complaint on the eve of trial to allege failure to promote. Second, Kier argues that the district court erred in refusing to admit statistical evidence to show that the average age of Commercial's attorneys dropped dramatically in two years time. We disagree with both contentions.

Kier filed his complaint alleging a violation of ADEA on October 5, 1982. Discovery was completed in the fall of 1983 and

defendant's motion for summary judgment was filed on September 9, 1983. The final pre-trial order was entered on October 17, 1983. Kier filed his motion to amend his complaint on January 22, 1985 pursuant to Fed. R. Civ. P. 15(b) which provides for amendment of the pleadings to conform them to the evidence. The trial began on January 24, 1985. A motion to amend a complaint is addressed to the sound discretion of the district court and will not be reversed absent an abuse of that discretion. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 330 (1971). While the Federal Rules of Civil Procedure envision a liberal policy toward amending pleadings (see Foman v. Davis, 371 U.S. 178 (1962)), Rule 15(b) provides that leave to amend shall be given freely only when amendment will aid in the presentation of the case and when the objecting party has failed to show prejudice resulting from the amendment.

The district court denied leave to amend,

finding that rather than conforming the pleading to the evidence, the proposed amendment would add an entirely new issue to the case on the eve of trial. The district court found therefore that amendment would prejudice the defense and refused to allow it. Based on an examination of the relevant discovery materials, we agree with the district court that failure to promote was neither an issue previously contemplated by the parties nor properly addressed by the already completed discovery. Accordingly, we find the district court did not abuse its discretion in denying leave to amend pursuant to Fed. R. Civ. P. 15(b).

Kier offered to show that the average age of attorneys in Commercial's Chicago office had dropped from 50 to 30 between 1981 and 1983. The district court granted Commercial's motion in limine to bar presentation of the statistics. In deciding whether to admit evidence the district court is to balance the probative worth

of the proffered evidence against its potential for undue prejudice. Fed. R. Evid. 403. A district court judge has broad discretion in determining the admissibility of evidence and may be reversed only upon a finding of abuse of discretion. See, e.g. United States v. Buishas, 791 F.2d 1310, 1313 (7th Cir. 1986).

Kier argues that statistics are an accepted method of proving age discrimination and that the district court erred in refusing to admit the statistics. Kier misconstrues the district court's reasoning. The district court did not refuse to admit the statistics because statistics are not generally probative of discrimination; instead the district court found that these particular statistics were not relevant to Kier's particular charge of discrimination. Kier alleged that Commercial fired him because of his age. The proffered statistics showed that new attorneys hired were substantially younger than those previously

employed. Kier was not alleging discriminatory hiring. Moreover, we are dubious of statistical evidence of hiring which fails to account for the applicant pool. At best, Kier's statistics show that older employees were replaced by younger employees. As we have previously noted, this "phenomenon" represents the normal course of employment histories, and is nothing to marvel at. When older employees leave the work force, for whatever reasons, they will often be replaced by younger employees. This does not give rise to an inference that an employee was fired because of his age. See Simmons v. McGuffey Nursing Home, Inc., 619 F.2d 369 (5th Cir. 1980).

There may be limited probative value in the statistics to support Kier's theory that Commercial was involved in an overarching plot to fire all its older attorneys and hire young attorneys. However, as the district court noted, there is absolutely no evidence that any

other attorneys were fired or forced to leave because of his or her age. In fact, of the three remaining staff attorneys who eventually left, one was less than 40 years of age and another left after Kier himself had called for his discharge on several occasions. It was therefore not an abuse of discretion to refuse to admit the proffered statistical evidence.

IV.

Finally, we reach the thrust of Kier's appeal: whether the evidence presented to the jury furnished a rational basis for a verdict for the plaintiff. For a reasonable jury to infer that Commercial violated ADEA, Kier had to show that Commercial's proffered reasons for discharge were a pretext. A plaintiff may demonstrate pretext either directly, by showing that "a discriminatory reason more likely motivated the employer or indirectly, by showing that the employer's proffered explanation is unworthy of credence." Burdine, 450 U.S. at

256. Commercial claimed that it fired Kier for insubordination, based on Kier's refusal to prepare a portion of the training manual. As direct proof that insubordination was a pretext, Kier presented the testimony of John Milano, who said that he was contacted by an employment recruiter hired by Commercial to find a new permanent managing attorney. Milano said the employment recruiter told him that she was instructed to find someone "between 40, 45, 50 at the most."

This evidence is relevant only to Commercial's search for a new permanent managing attorney. As previously discussed, Kier's complaint was based on wrongful discharge as a staff attorney. Commercial's decision to seek a younger permanent managing attorney, even if true - and even if discriminatory - is not relevant to Kier's case. We note too, that if the employment recruiter was truly expressing the desires of Commercial, Harlene Matyas, the

32 year old new permanent attorney, would have been similarly eliminated from Commercial's consideration. The jury may, however, have been entitled to draw a modest inference from Milano's testimony that Commercial was looking for younger attorneys in general. This inference alone, especially in the absence of any showing that others were fired or forced to leave, is insufficient to support a jury verdict against Commercial.

In the absence of a sufficient basis for finding a discriminatory motive, Kier could support the jury verdict by showing that Commercial's articulated reason for firing him was not worthy of credence. See Burdine, 450 U.S. at 2156; La Montagne, 750 F.2d at 1409 (7th Cir. 1984). Kier may meet this burden by showing (1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate his discharge, or (3) that they were insufficient to motivate

discharge. La Montagne, 750 F.2d at 1414-15. Kier does not contend that the training manual was not, at the time, a bona fide work project. For the jury verdict to stand, Kier would have to have shown that discharging an attorney for failure to work on a bona fide work project was not worthy of credence. While credibility is a jury determination, we agree with the district court that to infer an age discriminatory discharge here is "just too great a leap into speculation."

Kier argues that his letter to Ravich was entirely justifiable given how hard he had worked before hearing the rumor that Commercial had hired someone else. But Kier misses the point of violations under ADEA. Even if we were to accept the proposition that Kier's letter was justified and that Commercial had treated Kier unfairly-that would not amount to a violation of ADEA. An employer can fire an employee for any reason, fair or unfair, so long as the decision

to terminate is not based on age or some other protected category.[1]

We have found that none of the evidence is sufficient in itself to support the jury verdict. We find also, that all of the evidence taken as a whole is insufficient. Accordingly, the order of the district court granting judgment N.O.V. to the defendant is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Seventh Circuit

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[1] Although not pressed on appeal, Kier offered to show that Commercial sought to "clean house." In the absence of any evidence that such an intent was directed toward age we find that this intention alone is insufficient to sustain the jury verdict.

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APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

February 2, 1987

Before
HON. WILLIAM J. BAUER, Chief Judge
HON. HARLINGTON WOOD, JR., Circuit Judge
HON. WILLIAM J. CAMPBELL, Senior District Judge*

MORTON A. KIER, Plaintiff-Appellant,	) Appeal from
	) the United
	) States District
No. 86-1319 v.	) Court for the
	) Northern District
COMMERCIAL UNION INSURANCE COMPANIES, Defendant-Appellee.	) of Illinois.
	) Eastern Division.
	)
	) No. 82 C 6110
	) James B. Moran,
	) Judge

O R D E R

On consideration of the petition for rehearing filed by the attorneys for the plaintiff-appellant, and all of the judges on the original panel have voted to deny the

* The Honorable William J. Campbell, Senior District Judge for the Northern District of Illinois, is sitting by designation.

§623. Prohibition of age discrimination.

(a) Employer practices. It shall be unlawful for an employer --

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
> (3) to reduce the wage rate of any employee in order to comply with this Act [29 USCS §§621 et seq.].

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(f) lawful practices, age an occupational qualification; other reasonable factors; seniority system; employee benefit plans; discharge or discipline for good cause. It shall not be lawful for an employer, employment agency, or labor organization --

> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;
> (2) to observe the terms of a bona fide

seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act [29 USCS §§621 et seq.], except that no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act [29 USCS §631(a)] because of the age of such individual; or

(3) to discharge or otherwise discipline an individual for good cause.

(Dec. 15, 1967, P.L. 90-202, §4, 81 Stat. 603; Apr. 6, 1978, P.L. 95-256, §2(a), 92 Stat. 189.)

APPENDIX D

In the United States District Court
For The Northern District of Illinois
Eastern Division

No. 82 C 6110

MORTON A. KIER,
Plaintiff,

v.

COMMERCIAL UNION INSURANCE COMPANIES,
Defendant.

MEMORANDUM AND ORDER

This case was tried to verdict on the primary issues, which led, in turn, to a number of post-trial motions. One, for judgment notwithstanding the verdict, is dispositive of the others. This court, reluctant to disturb a jury's determination, has read the trial transcript to determine whether there is reasonable support for that determination. I cannot, in good conscience, conclude that a reasonable jury could find that age was a determinative factor in the plaintiff's

termination and, therefore, I must and do grant that motion. What follows is a review of the evidence most favorable to plaintiff.

Plaintiff was 53 when he left defendant's employment in January, 1982. He had been, for a number of years, a staff attorney and then a senior trial attorney in a small law office devoted to the defense of claims against defendant's insureds. A new national management team had come in about 1978 or 1979 which began to expand the number of officers and introduce various new procedures, but that change apparently had little impact on the Chicago office. The managing attorney resigned, however, in May, 1981, to accept a judicial appointment, which meant that an acting managing attorney and, subsequently, a replacement managing attorney had to be appointed. That appointment decision was primarily the responsibility of Kenneth Griffin of the home office.

The Chicago office was then staffed by plaintiff and three other attorneys, Cohen, Canaday and Ossey. Three of the four, including plaintiff, were over 40 years of age. The fourth, Harvey Cohen, was under that age. Griffin, upon the recommendation of the resigning managing attorney, named plaintiff as acting managing attorney. He thereafter advised plaintiff that any of the attorneys in the office could apply for the position of managing attorney and plaintiff, Canaday and Cohen did so. Interviews followed. Cohen testified that much of the discussion at his interview related to Griffin's dissatisfaction with the former managing attorney and the possibility of scratching the whole operation and starting over with new people. Cohen and Canaday were immediately rejected and Cohen left in October, 1981, because of the uncertain future of the office. Griffin expressed similar dissatisfaction in his initial interview with

plaintiff in June, 1981. Plaintiff was called back for a second interview a month or six weeks later at the Oak Brook location of the claims department. In the meantime he had been carrying on as acting managing attorney in a creditable fashion.

Shortly after July 4, 1981, plaintiff received a memorandum sent to the managing attorneys from Joseph Ravich, the claims counsel, respecting the preparation of a training manual. He called and talked to Ravich shortly thereafter, explaining that he had been unable to locate the indicated materials where the former managing attorney might have left them. Ravich asked plaintiff to look again, as the materials had been passed out in April, and in the meantime Ravich would contact the former managing attorney and talk to Griffin. Ravich did not say anything about the importance of this training manual, although plaintiff was aware that the company was refining training

procedures to develop settlement proposals and he had done some work on that. He was also aware that the company was beginning to develop cost figures and cost estimates based upon actual time spent and expectable time projections through a computerized billing process, and that the training manual was a billable project.

In September, Ravich called to inquire when plaintiff's portion of the training manual would be completed. Plaintiff had not found the materials and had heard nothing further, so he had done nothing, and he so informed Ravich. Ravich shortly thereafter forwarded the materials and told plaintiff to call Griffin or himself if plaintiff had any questions. Plaintiff called Griffin, who explained generally what Kier was to do and referred him back to Ravich. Ravich then suggested that plaintiff call one of the other managing attorneys, and he did so, talking, he believed,

to Michael Martino. Martino said he had sent in his completed project months before and that there didn't seem to be much more to do on it. He did explain that the manual was to be patterned after the National Institute of Trial Advocacy workbook. Plaintiff did nothing further on the matter.

By October, 1981, plaintiff had heard nothing further from Griffin respecting the managing attorney job and Cohen had told him (erroneously) that someone else had been selected. Feeling aggrieved, plaintiff used the training manual project as a vehicle for expressing those grievances. On October 6, 1981, he wrote Ravich, who had no responsibility for the hiring decision, referring to the information given him by Cohen, complaining rather intemperately about the manner in which he had been used, and returning the training manual materials with the advice that he was not going to do the project. Plaintiff sent a copy

to Griffin, the person he actually wished to address. Plaintiff then realized that his action could possibly lead to his termination. Griffin promptly called back, said he could not have someone working for him who acted on rumors and terminated plaintiff for insubordination, although plaintiff apologized for the letter.

Kier remained with defendant, however, until January, 1982. He testified that Griffin told him he could stay on if the new managing attorney so requested; Griffin testified that he said he would give consideration to such a request. There was no successor managing attorney in place when plaintiff was told to leave, although one was hired about that time, with her employment commencing in February. The jury could infer that the timing of plaintiff's departure was related to the timing of that hiring, although a contributing or determinative factor could have been an even more intemperate letter plaintiff wrote to Griffin on December

30, 1981, regarding another attorney in the office.

Plaintiff's argument to the jury and here rests, essentially, on three contentions. One is that a recruiter who, one can infer, was acting for defendant in seeking a new managing attorney, let it be known that the company wanted someone younger than 45 or 50. The second is that the defendant had indicated an interest in cleaning house, which meant finding a means of getting rid of the older attorneys then employed in Chicago. The third is that the discharge was so disproportionate to the offense by a long-time employee that it must have been a pretext and the only reasonable explanation for the action was plaintiff's age. Those contentions, singly and in combination, do not, in this court's judgment, support the verdict.

This case does not fit neatly into the usual pattern because Kier was a senior trial attorney only acting as managing attorney. His

"replacement" in one sense was the new managing attorney. In another sense it was whoever was later hired as a trial attorney. It is clear, however, that Griffin made the termination decision, although he had to have that decision approved by his superior and by corporate personnel, and that subsequent employment decisions were primarily the responsibility of the new managing attorney. The parties did not, however, rest on that ambiguity, and neither does the court. It is significant, however, with respect to the plaintiff's first contention, that there was direct evidence of age discrimination so as to prove the proffered reason for discharge pretextual. Putting aside the somewhat attenuated proof that the recruiter was acting on the instructions of the defendant, it permits at most the conclusion that defendant discriminated in the selection of a new managing attorney. But that is not plaintiff's claim, nor could it be. By plaintiff's own evidence,

defendant was not particularly satisfied with the Chicago office and, while he performed in accordance with the defendant's legitimate expectations, plaintiff was no star. After the October letter he could not reasonably be expected to be considered for the managing attorney position, even had he been within the age range the recruiter was supposedly considering. The inference that plaintiff asked the jury to make is that because defendant wanted the new managing attorney to be no older than 45 or 50 it had discriminatory intent when it discharged an already employed 53-year old trial attorney. Such an inference, in this court's judgment, is not reasonable. See La Montagne v. American Convenience Products, Inc., 750 F.2d 1405, 1412 (7th Cir. 1984) (chain of inference from division manager's recommendation for hiring to company president's motive in firing unreasonable); Christensen v. Equitable Life Assurance Society, 767 F.2d 340, 343 (7th

Cir. 1985) (inference of discrimination in discharge of white person from company's active efforts to recruit blacks unreasonable).

His second argument fares no better. The legitimacy of a "phasing out the old guard" argument has been questioned, La Montagne, 750 F.2d at 1410, but even if it has force in a proper case it is not applicable here. The office had four attorneys, three over forty and one below that age. No one other than plaintiff was terminated or forced to leave. There is no suggestion of terminating older, highly paid employees to bring in younger and less expensive replacements. Indeed, the testimony was that Griffin thought that salaries were too low.

Plaintiff's primary contention is that his discharge had to be based, in part at least, upon his age because the termination was a disproportionate response to plaintiff's October letter. Since what happened then is not materially in dispute, there is no direct

evidence that the reason contemporaneously given by Griffin was pretextual (a reason also related by Griffin to his superior and the personnel director if they and Griffin are believed, with some contradiction among them as to whether evaluations were also discussed). Plaintiff did write the letter. Nor is there any indirect evidence in the form of differences between the treatment of plaintiff and of another or others in comparable circumstances. We are left, then, with the contention that the response was so unreasonable that age must have been a contributing factor. To bolster that argument, which by its nature is inherently speculative, plaintiff relies upon evidence that the training manual project was not all that important and he certainly did not understand it to be so considered by his superiors, and some evidence supports those positions. But plaintiff's understanding is irrelevant and his superiors' commitment to the project is of only marginal

relevance.

It is true that Kier did not have to prove that the articulated reason for his discharge was completely false. Golomb v. Prudential Insurance Co., 688 F.2d 547, 551 (7th Cir. 1982). But he must, overall, have shown that the reason given did not really motivate the discharge, or at least that if it was a factor, nevertheless age must have been a determining factor because the reason could not by itself be grounds for discharge. La Montagne, 750 F.2d at 1414. Employers may legitimately discharge older employees for any number of reasons which may appear unfair or harsh, particularly when, as here, they are reorganizing a unit in an effort to improve its performance. See, e.g., Parker v. Federal National Mortgage Ass'n, 741 F.2d 975, 979 (7th Cir. 1984) (personality flaws); Christensen, 767 F.2d at 342 (despite satisfactory work, to make way for another perceived as more able). The ADEA does not

provide for general judicial review of such business decisions, but rather merely proscribed age discrimination. Kephart v. Institute of Gas Technology, 630 F.2d 1217 (7th Cir. 1980). Thus, if the reason given for a discharge actually happened and is the kind of decision a rational businessman might make, a plaintiff attempting to show pretext has a heavy burden of proof. Elliott v. Group Medical & Surgical Service, 714 F.2d 556, 566-567 (5th Cir. 1983).

Even viewing the evidence in the light most favorable to Kier, he simply has not met that burden. La Montagne, 750 F.2d at 1415, suggests, for example, that a plaintiff might show that the proffered reason was far removed in time from the discharge, or that it applied with equal or greater force to another employee who was not discharged. Kier had no such evidence.

It is undisputed that plaintiff was at the juncture the acting managing attorney in a small

office, and was still being considered for selection as managing attorney (although that selection could well have been very unlikely), that the defendant had questions about the effectiveness of that office, that the defendant was opening up new offices and changing procedures, that plaintiff was performing in a creditable but by no means outstanding manner, that while the acting managing attorney he wrote a bitter letter based upon an erroneous rumor he did not verify, that he wrote it to a person having no responsibility for or involvement in the selection of the new managing attorney as a vehicle for complaining to Griffin, that he gave every indication of refusing to do that which he had been told to do, and that he at the time realized that it could possibly result in his discharge. To infer from that a discriminatory discharge is just too great a leap into speculation. The timing of his subsequent departure may well have been unfair and the

discharge itself a harsh response, but they do not adequately support the inference argued by the plaintiff that the stated reason was unworthy of credence and that therefore age must have been a factor.

/s/ JAMES B. MORAN
Judge, United States District Court

January 30, 1986